

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 September 2017

Public Authority: Chief Constable of Humberside Police
Address: Priory Road
Kingston Upon Hull
HU5 5SF

Decision (including any steps ordered)

1. The complainant has requested information about any complaints made against a named officer at Humberside Police. He also requested information relating to any officer serving with Humberside Police who had either incited or been accused of inciting, a police officer to commit perjury. Humberside Police neither confirmed nor denied holding the information by virtue of section 40(5) (personal information) of FOIA.
2. The Commissioner's decision is that Humberside Police has applied section 40(5) of FOIA appropriately. However, she considers that it has breached section 10(1) (time for compliance) of FOIA.
3. The Commissioner does not require Humberside Police to take any steps as a result of this decision.

Request and response

4. On 30 September 2015, the complainant wrote to Humberside Police (HP) and requested information in the following terms:

"I would like disclosing details of all or any complaints made against [name redacted], including any from officers serving with Humberside police or any other police force. My motivation for submitting this request is that I have proof of fabricated evidence that Police Officer [name redacted] has signed his name to on [sic] a witness statement.

On reflection, I would like this request to also include a second element which is to ask for all or any information relating to any officer serving with Humberside police who has (or has been accused of) inciting a police officer to commit perjury."

5. HP responded on 28 October 2015. It stated that it was neither confirming nor denying whether it held information in relation to the first part of the request, by virtue of section 40(5). With regard to the second part of the request, HP did not respond to it.
6. There was correspondence between the complainant and HP from 1 November to 14 December 2015. The complainant requested an internal review on 1 November 2015 and also wanted a response to the second part of his request; HP provided the response to the second part of his request on 15 December 2015, disclosing some information to the complainant.
7. Following an internal review HP wrote to the complainant on 28 September 2016. It upheld its application of sedition 40(5).

Scope of the case

8. Initially the complainant contacted to Commissioner to complain about the lack of an internal review. The Commissioner contacted HP about this. There was a delay in carrying out the internal review.
9. The complainant contacted the Commissioner on 10 October 2016 and confirmed that the internal review had been carried out. He also complained about the way his request for information had been handled. The complainant explained that HP could not apply section 40(5) as an officer acting as a police officer is an office holder who is not acting in a personal capacity. He did not complain about HP's response to the second part of his request, therefore the Commissioner will not consider this point any further. However, she will consider the length of time taken to respond to the second part of the complainant's request.
10. The Commissioner will consider HP's application of section 40(5) and how it dealt with the request.

Reasons for decision

Section 40 – personal information

11. Section 40(5) of FOIA provides that if a public authority receives a request for information which, if held, would be the personal data of a

third party, it can rely on section 40(5)(b)(i) to neither confirm or deny whether or not it holds the requested information.

12. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would involve the disclosure of personal data and secondly, whether disclosure of that personal data would be in breach of any of the data protection principles.

Is the information personal data?

13. The first step for the Commissioner is to determine whether the requested information, if held, constitutes personal data as defined by the Data Protection Act 1998 (the DPA). If it is not personal data, then section 40 cannot apply.

14. The DPA defines personal data as:

"...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."

15. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
16. The requested information relates to an identifiable individual, namely the named police officer. Therefore, the Commissioner considers that the requested information, if held, would be the personal data of that police officer.

Would confirmation or denial breach the first data protection principle?

17. The first data protection principle states –

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

*(a) at least one of the conditions in Schedule 2 is met, and
(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."*

18. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the disclosure, ie the confirmation or denial in this case, can only be given if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.
19. When considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
 - the individual's reasonable expectations of what would happen to their information;
 - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned);
 - any legitimate interests in the public having access to the information; and,
 - the balance between these and the rights and freedoms of the individuals who are the data subjects.
20. The Commissioner recognises that people have an expectation that HP, in its role as a responsible data controller, will not disclose certain information about them and that it will respect their confidentiality.
21. Accordingly, the Commissioner considers that the data subject would not reasonably expect HP to place details of whether he had been the subject of any complaints, into the public domain.
22. As to the consequences of disclosure upon a data subject, the question – in respect of fairness - is whether disclosure would be likely to result in unwarranted damage or distress to that individual.
23. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the withheld information. She will also take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public at large, without conditions.
24. Given the nature of the request and the sensitivity of the subject matter, the Commissioner considers that confirming or denying in this case could lead to an intrusion into the private life of the police officer concerned and the consequences of any disclosure could cause him damage and distress.
25. The Commissioner notes the complainant's point that the police officer is an office holder who is not acting in a personal capacity. However, she considers that the requested information, in this case confirming or

denying whether the requested information was held, if disclosed would reveal something about the police officer concerned.

26. It is the Commissioner's view that the data subject would have little – if any - expectation that such details would be put into the public domain by way of a request under the FOIA.
27. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to disclose information, or in this case confirm or deny if information is held, if there is a more compelling public interest in doing so. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in confirming or denying if the information is held.
28. The Commissioner would stress that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. The public interest in confirming or denying whether or not information is held must outweigh the public interest in protecting the rights and freedoms of the data subject if providing confirmation or denial is to be considered fair.
29. The interest in disclosure must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.
30. The Commissioner understands that the complainant has concerns about the named police officer and that there would be some interest in knowing whether he had been complained about. However, the Commissioner considers that if the police officer concerned had been complained about, HP would have dealt with such complaints according to its own policies and procedures.
31. In light of the nature of the information and the reasonable expectations of the data subject, the Commissioner is satisfied that confirming or denying if the requested information is held would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the data subject. She considers that these arguments outweigh any legitimate interest in disclosure and has concluded that confirmation or denial in this case would breach the first data protection principle.
32. The Commissioner therefore considers the exemption at section 40(5) is engaged and the duty to confirm or deny does not arise.

Procedural issues

33. The Commissioner notes that initially HP did not respond to the second part of the complainant's request within twenty working days after the date of receipt.

Section 10 – time for compliance

34. Section 10(1) of FOIA provides that a public authority has to respond to a request promptly and no later than the twentieth working day following the date of receipt.
35. Therefore, the Commissioner considers that HP has breached section 10(1).

Other matters

36. The complainant requested an internal review on 1 November 2015. HP responded on 28 September 2016 almost eleven months later.
37. Part VI of the section 45 Code of Practice (the code) makes it good practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information.
38. While no explicit timescale is laid down in the code, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of receipt of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
39. The Commissioner considers that a period of more than eleven months to conduct the internal review is excessive and not in accordance with the section 45 code.

Right of appeal

40. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
42. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Jon Manners
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